

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LISA ANNETTE TUBBS
Claimant

VS.

PRESBYTERIAN MANORS OF MID-AMERICA, INC.
Respondent
Self-Insured

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 187,297

ORDER

Respondent appeals a preliminary hearing Order for Medical Treatment entered by Administrative Law Judge Floyd V. Palmer on November 29, 1995.

ISSUES

Respondent requested Appeals Board review of the following issues as set forth in its Application for Review:

- "1 Whether claimant suffered an accidental injury that is causing her current symptoms, and whether the medical treatment awarded is for an injury that arose out of and in the course of the employee's employment.
- "2 Whether relief was granted upon issues that were not raised at the benefit review conference."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

- (1) The Appeals Board has jurisdiction to review this preliminary hearing order as the respondent questions whether claimant's need for medical treatment is for an injury that arose out of and in the course of her employment. See K.S.A. 44-534a(a)(2).

This is a post-award request from an agreed upon Award entered by Administrative Law Judge Floyd V. Palmer on July 11, 1995. The Award provided claimant would be entitled to future medical treatment by agreement or upon proper application to the Director of Workers Compensation. After proper demand to the respondent, claimant made this request for medical treatment and change in physician pursuant to the preliminary hearing procedures set forth in K.S.A. 44-534a. This matter came before the Administrative Law Judge on a Form E-3 Application for Preliminary Hearing filed by the claimant requesting medical treatment for

claimant's injury. The Administrative Law Judge, in his preliminary hearing Order, granted claimant's request for medical treatment with an orthopedic surgeon and referrals therefrom, to be chosen from a list of three physicians to be submitted by the respondent. He further ordered if respondent does not provide such list, claimant may choose her own treating physician.

Respondent argues that claimant's present need for medical treatment is unrelated to her low back injury that occurred on September 29, 1993 that is the subject of the agreed upon award of compensation entered on July 11, 1995. Respondent contends that claimant's current symptoms are related solely to her obesity and degenerative disc disease and not to the September 29, 1993 work-related injury. Claimant agrees that her obesity and degenerative disc disease are factors in her need for medical treatment. However, claimant asserts that her work-related injury is what has caused her to be symptomatic. Claimant testified that prior to her injury of September 29, 1993, she had no previous back problems. Claimant also testified that her present pain was similar to her pain following her September 29, 1993 injury. Claimant denies that she had an intervening accident that caused her current symptoms. Claimant's treating physician, Dr. Richard Wendt, an orthopedic surgeon, diagnosed claimant with preexisting degenerative disc disease and obesity. However, Dr. Wendt was of the opinion that even without these preexisting conditions, claimant's work-related accident would have caused her injury. Dr. Wendt, in a letter dated October 24, 1995, opined that the majority of claimant's pain was related to her fall and her preexisting disc disease was aggravated by such fall. However, Dr. Wendt went on to state that he had serious doubts that the fall was the one contributing factor that had led to her long-term problems. He attributed her continuing problems primarily to her obesity, physical inactivity and her compromised physical state.

The medical records of Mt. Oread Medical Arts Center in Lawrence, Kansas, were also offered by the claimant and admitted into evidence at the preliminary hearing. Respondent had recently referred claimant to this health care provider for treatment. Claimant was placed in physical therapy and weight loss was recommended for claimant's continuing symptoms.

After reviewing the testimony of the claimant and the medical records attached as exhibits to the preliminary hearing, the Appeals Board finds that the preliminary hearing Order of Administrative Law Judge Floyd V. Palmer that granted claimant's request for medical treatment and change in physician should be affirmed. The Appeals Board is mindful that the medical records attributed at least part of claimant's low back problems to her degenerative disc disease and obesity, however, for preliminary hearing purposes, the Appeals Board finds that these medical records coupled with the claimant's testimony establish that her present need for medical treatment has a causal relationship to her work-related back injury.

(2) The respondent next argues that the Administrative Law Judge cannot consider the claimant's request for a change in physician because claimant failed to raise this issue at the benefit review conference. Claimant, at the preliminary hearing, specifically requested a change in physician in addition to her request for medical treatment. Respondent, at that time, had an opportunity to object to this request because it was not raised at the benefit review conference. However, the respondent did not make such objection. The Appeals Board only has jurisdiction to review acts, findings, awards, decisions and rulings made by an administrative law judge. See. K.S.A. 1995 Supp. 44-551(b)(1). Since this issue was not raised by the respondent before the Administrative Law Judge, and therefore not considered by the Administrative Law Judge, the Appeals Board finds that respondent may not raise it for the first time on appeal.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Floyd V. Palmer, dated November 29, 1995, should be, and the same is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, Kansas
Ross A. Hollander, Wichita, Kansas
Kasey Alan Rogg, Wichita, Kansas
Jeffrey A. Dehon, Kansas City, Kansas
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director